THE STATE OF SOUTH CAROLINA
In The Supreme Court

State of South Carolina,

Respondent,

v.

Gary Allen Rimert,

Appellant.

Appeal From York County
Paul E. Short, Jr., Judge

Opinion No. 24093
Heard April 5, 1994 – Filed June 13, 1994

AFFIRMED

David I. Bruck, of Columbia; and David G. Belser, of Asheville, N.C., for appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General Alexandria Broughton Skinner, all of Columbia, and Solicitor Larry F. Grant, of York, for respondent.

Moore, A.J.: Appellant was found guilty but mentally ill (GBMI) on four counts of murder and sentenced to four concurrent life sentences. We affirm.

FACTS

In June 1990 appellant was hospitalized and diagnosed as a paranoid schizophrenic in Indiana where he lived with his parents. On July 11, 1990, he was released from the hospital in Indiana although he was actively hallucinating. He left his medication in Indiana and drove all night to his grandparent's house near Rock Hill.

Shortly after arriving at his grandparent's house, appellant killed his grandparents and their neighbors by stabbing them with a kitchen knife. Appellant pled not guilty by reason of insanity (NGBRI).

ISSUES

1) Did the trial judge err in denying appellant's motion for a directed verdict?

2) Did the trial judge err in denying appellant's motion

to charge the jury on the disposition of defendants found NGBRI and those found GBMI?

3) Did the trial judge err in submitting possible verdicts of guilty and GBMI?

DISCUSSION

1) Directed Verdict Motion

Appellant moved for a directed verdict of NGBRI on the ground the evidence did not support a finding of sanity. The trial judge held there was some evidence of sanity. Appellant citing *State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985), argues the trial judge should have granted a directed verdict because the State did not present sufficient evidence that appellant was sane. We disagree.

In *Hernandez*, the State relied on the presumption of sanity and the permissible inference of flight as evidence of sanity. We found the presumption of sanity itself does not create a jury issue and the circumstances of Hernandez's flight negated the permissible inference of flight. We then concluded the State had not presented any evidence of sanity.

Here, there was testimony from an officer who arrived on the crime scene shortly after the murders that appellant knew he had done something wrong . Further, the State presented other evidence of sanity, including that appellant washed off the knife and questioned how he could "get out of this." There was sufficient evidence of appellant's sanity and the trial court did not err in denying his motion for a directed verdict. *Poindexter, supra; State v. Prince*, Op. No. 23965 (S.C. Sup. Ct. filed December 13, 1993)(Davis Adv. Sh. No. 30 at 8).

2) Jury Charge on Effect of GBMI and Guilty Verdicts

Appellant argues the trial judge should have instructed the jury on the effect of GBMI and NGBRI verdicts. Appellant argues that for all practical purposes guilty and GBMI verdicts are the same and the jury should have been informed of this fact and further informed that a verdict of NGBRI would have led to appellant's hospitalization until a court order released him. Appellant contends these instructions were necessary because during closing argument the solicitor misled the jury by stating appellant would be "dealt with by people who deal with people who are mentally ill."

The trial court ruled that even though appellant did not make a contemporaneous objection to the solicitor's closing argument, he would give the jury a curative instruction that sentencing was of no concern to them. *State v. Huiett*, 271 S.C. 205, 246 S.E.2d 862 (1978)(instruction on post-verdict dispositions is proper to cure a misstatement of law). Appellant refused this charge. Appellant argues the offered instruction was not curative and instructions on the effects of the verdicts were the only instructions which could have cured the solicitor's comments. We disagree.

This issue was also addressed in *Poindexter, supra*. In *Poindexter* we held the consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense. Therefore, this argument is without merit.

3) Submission of guilty and GBMI verdict forms

The trial judge submitted the following verdicts to the

jury: guilty, not guilty, NGBRI, and GBMI. Appellant argues the trial judge erred in submitting the verdict form of guilty. Appellant's argues there was no evidence to support a guilty verdict and submission of it violated his due process rights and prejudiced him because it led to a compromise verdict of GBMI.

S.C. Code Ann. § 17-24-30 (Supp. 1993) provides:

> In a prosecution for a crime when the affirmative defense of insanity is raised sufficiently by the defendant, or when sufficient evidence of a mental disease or defect of the defendant is admitted into evidence, the trier of fact shall find under the applicable law, and the verdict *must* so state, whether the defendant is:
>
> (1) guilty;
> (2) not guilty;
> (3) not guilty by reason of insanity; or
> (4) guilty but mentally ill.

(emphasis added). We hold this section requires the submission of all four of these verdict forms. *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992)("must" is mandatory). Additionally, there was evidence appellant was legally sane and, therefore, the jury could have found him guilty.

Appellant then argues he could waive the GBMI verdict form because there is no practical difference between guilty and GBMI and by submitting all of the verdict forms, the jury reached a compromise verdict of GBMI.[1] Since we hold all

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[1]On appeal, appellant seems to be attacking the constitutionality of the GBMI verdict itself. This issue was not raised nor ruled on below and is therefore barred. *State v. Williams*, 303 S.C. 410, 401 S.E.2d 168 (1991).

four verdict forms in § 17-24-30 must be submitted, appellant cannot waive a GBMI verdict form once he has raised the issue of sanity. *See People v. Ritsema*, 105 Mich.App. 602, 307 N.W.2d 380 (1981)(GBMI verdict must be submitted because statute mandates it and it cannot be waived by defendant). Therefore, this argument is also without merit.

AFFIRMED.

Chandler, A.C.J., TOAL, A.J., and Acting Associate Justice William H. Ballenger, concur. FINNEY, A.J., dissenting in separate opinion.

FINNEY, A.J., DISSENTING: I respectfully dissent. In my opinion, appellant was entitled to a directed verdict of not guilty by reason of insanity (NGBRI).

A defendant is NGBRI if, *at the time of the commission of the act*, he, as the result of mental disease or defect, lacks the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong. S.C. Code Ann. § 17-24-10(A)(Supp. 1993). Here, the majority relies on three pieces of evidence which allegedly negate appellant's showing of insanity: (1) a police officer's testimony that, shortly after the killings, appellant looked like he knew he had done something wrong; (2) the finding of a knife which appellant could have washed, which could have been used to stab the victims; and (3) appellant's question, hours after the deaths, as he was being read the warrants, how he "could get out of this". Viewed in context, none of this evidence is sufficient to present a jury issue on appellant's sanity. *Compare State v. Milian-Hernandez*, 287 S.C. 183, 336 S.E.2d 476 (1985) (apparent evidence of sanity not inconsistent with appellant's insanity defense).

THE SUPREME COURT OF SOUTH CAROLINA

July 29, 1994

David I. Bruck, Esquire
P.O. Box 11744
Columbia, S.C. 29211

Re: The State v. Gary Allen Rimert

Dear Mr. Bruck:

The Court has issued the following Order on your Motion to Supplement the Record:

"Motion to Supplement the Record is granted.

s/ A. Lee Chandler, C.J.
For the Court
Waller, A.J., not participating

July 29, 1994."

The Court has also issued the following Order on your Petition for Rehearing:

"Petition for Rehearing is denied.

s/ A. Lee Chandler, C.J.
s/ Jean H. Toal A.J.
s/ James E. Moore A.J.

"I would grant.

s/ Ernest A. Finney, Jr. A.J.

July 29, 1994."

The remittitur in this matter is today being forwarded to the Clerk of Court for York County.

Very truly yours,

s/Clyde N. Davis, Jr.
Clerk

CHAPTER 24

Mentally Ill or Insane Defendants

§ 17-24-10. Affirmative defense.

(A) It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.

(B) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

(C) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the defense of insanity.

§17-24-20. Guilty but mentally ill; general requirements for verdict

(A) A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10-(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

(B) To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the

crime, and the burden of proof is upon the defendant to prove by a preponderance of evidence that when he committed the crime he was mentally ill as defined in subsection (A).

(C) The verdict of guilty but mentally ill may be rendered only during the phase of a trial which determines guilt or innocence and is not a form of verdict which may be rendered in the penalty phase.

(D) A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).

§17-24-30. Form of verdict.

In a prosecution for a crime when the affirmative defense of insanity is raised sufficiently by the defendant, or when sufficient evidence of a mental disease or defect of the defendant is admitted into evidence, the trier of fact shall find under the applicable law, and the verdict must so state, whether the defendant is:

(1) guilty;
(2) not guilty;
(3) not guilty by reason of insanity; or
(4) guilty but mentally ill.

§17-24-40. Commitment of defendant found not guilty by reason of insanity.

(A) In the event a verdict of "not guilty by reason of insanity" is returned, the trial judge shall order the defendant committed to the South Carolina State Hospital for a period not

to exceed one hundred twenty days. During that time an examination shall be made of the defendant to determine the need for hospitalization of the defendant pursuant to the standards set forth in §44-17-580 of the 1976 Code.

(B) A report of the findings shall be made to the chief administrative judge of the circuit in which the trial was held, the solicitor, the defendant, and the defendant's attorney.

(C) (1) Within fifteen days after receipt of this report by the court, the chief administrative judge of the circuit in which the trial was held shall hold a hearing to decide whether the defendant should be hospitalized pursuant to the standard of §44-17-580 of the 1976 Code.

(2) (a) If the chief administrative judge finds the defendant not to be in need of hospitalization, he may order the defendant released upon such terms or conditions, if any, as he shall deem appropriate for the safety of the community and the well-being of the defendant.

(b) In the event the chief administrative judge finds the defendant to be in need of hospitalization, he shall order him committed to the South Carolina State Hospital.

(c) If at a later date it is determined by officials of the State Hospital that he defendant is no longer in need of hospitalization, they shall notify the chief administrative judge, the solicitor, the defendant, and the defendant's attorney. Within twenty-one days after the receipt of this notice the chief administrative judge, upon notice to all parties, shall hold a hearing to

determine whether the defendant is in need of continued hospitalization pursuant to the standard of §44-17-580 of the 1976 Code. If the finding of the court is that the defendant is in need of continued hospitalization, it shall order his continued confinement. If its finding is that the defendant is not in need of continued hospitalization, it may order the defendant released upon such terms and conditions, if any, as the chief administrative judge shall deem appropriate of the safety of the community and the well-being of the defendant.

(D) Any terms and conditions imposed by the chief administrative judge shall be therapeutic in nature, not punitive. Therapeutic terms shall include, but not be limited to, requirements that the defendant:

(1) continue taking medication for an indefinite time and verify in writing the use of medication;

(2) receive periodic examinations and reviews by psychiatric personnel;

(3) report periodically to the probation office for an evaluation of his reaction to his environment and his general welfare.

(E) The chief administrative judge of the circuit in which the trial was held shall at all times have jurisdiction over the defendant for the purposes of this chapter.

§17-24-50. Length of confinement or supervision of defendant found not guilty by reason of insanity.

In no case shall a defendant found not guilty by reason of insanity be confined or be under supervision longer than the maximum sentence for the crime with which he was charged without full civil commitment proceedings being held.

§17-24-60. Petition by attorney of defendant found not guilty be reason of insanity.

Two years from the date of commitment the defendant's attorney may petition the chief administrative judge to be relieved as counsel.

§17-24-70. Sentencing of defendant found guilty but mentally ill.

If a verdict is returned of "guilty but mentally ill" the defendant must be sentenced by the trial judge as provided by law for a defendant found guilty, however:

(A) If the sentence imposed upon the defendant includes the incarceration of the defendant, the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence.

(B) If the sentence includes a probationary sentence, the judge may impose those conditions and restrictions on the release of the defendant as the judge considers necessary for he safety of the defendant and the community.